No. 95-766

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

E. BENJAMIN NELSON, In His Official Capacity as Governor of the State of Nebraska; DONALD STENBERG, In His Official Capacity as Attorney General of the State of Nebraska, and MARY DEAN HARVEY, in her Official Capacity as Director of the Nebraska Department of Social Services,

Petitioners,

v.

G. WILLIAM ORR, M.D., On Behalf of Himself and the Medicaid-Eligible Women Seeking Abortions He Serves; and WOMENS SERVICES, P.C.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether States, by virtue of their participation in the Medicaid program, are required to use their own funds to pay for the cost of every medically necessary medical procedure or service, including abortion, for which federal matching funds are made available.

2. Whether 42 U.S.C. § 1983 may be used to secure a remedy in this or any Supremacy Clause case.

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OPINIONS BELOW

The Petitioner seeks a writ of certiorari from the opinion of the United States Court of Appeals for the Eighth Circuit filed in *Orr v. Nelson*, reported at 60 F.3d 497 (July 25, 1995) rehearing en banc denied September 22, 1995 (6 to 5 vote) (App. 1-22; 34). The opinion of the United States District Court for the District of Nebraska is not reported (App. 22-33).

STATEMENT OF JURISDICTION

(i)

The opinion and judgment of the Eighth Circuit was filed on July 25, 1995 (App. 2). The Petitioners' suggestion for Rehearing En Banc was denied, **on a vote of 6 to 5**, on September 22, 1995 (App. 34). Pursuant to Eighth Circuit Rule 35A(1c)(4), all suggestions for rehearing en banc are also deemed to include both a Petition for Rehearing by the panel that decided the case **and** a Suggestion for Rehearing En Banc. Under Sup. Ct. R. 13.3, this Petition for Writ of Certiorari must be filed no later than December 21, 1995.

(ii)

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

Question 1

1. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396V (1994) (the "Medicaid Act").
2. None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated that such procedure is necessary to

save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Amendment to the annual Department of Labor, Health and Human Services & Education Related Agencies Appropriations Act of 1994, § 509, Pub. L. No. 103-112, 107 stat 1082, 1113 (October 21, 1993) (the "Hyde Amendment").

3. NMAP covers medical procedures and abortions only when the life of the mother would be endangered if the fetus were carried to term. A physician shall certify the diagnosis by medical reports which include the name and address of the client.

471 Nebraska Administrative Code § 18-004.08.

Question 2

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

STATEMENT OF THE CASE

Since 1976, the Congressional bills appropriating funds to the Department of Health and Human Services (HHS) have included a provision that no federal funds

may be used to pay for abortions except in specified circumstances. This provision is known as the Hyde Amendment. From 1982 to 1993, the Hyde Amendment prohibited the use of federal funds to pay for abortions in any case except to save the life of the mother. During this period, States had the option to pay for other abortions without federal matching funds.

On December 28, 1993, the Department of Health and Human Services (hereinafter HHS), issued a letter to State Medicaid Directors. The letter pointed out that the new version of the Hyde Amendment was revised to allow for the use of federal funds to pay for abortions in cases where the pregnancy resulted from an act of rape or incest as well as those cases where the life of the mother is in danger. The modification thus permitted federal funds appropriated by Congress under Title XIX to pay for abortions in cases of rape or incest. *See Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 172-175 (3rd Cir. 1995), *rehearing en banc denied* Aug. 24, 1995, on a 7 to 7 vote, for a detailed description of the letter.

HHS informed the state directors that it interpreted the Hyde Amendment as signifying Congressional intent that abortions resulting from rape or incest should be considered to fall within the scope of services that **must** be provided by States in their state plans. Thus, HHS ordered the state directors to use **state** funds to pay for abortions in cases of rape or incest. HHS directed that "all States must ensure that their state plans do not contain language that precludes FFP (federal financial participation) for abortions that are performed to save the life of the mother or to terminate pregnancies resulting from rape or incest." HHS has threatened to withhold federal Medicaid funds from States that do not comply with the directive.

At the time of the HHS directive, Nebraska permitted the use of public funds for abortions only in cases where the mother's life is endangered. Neb. DPW Program Manual § 18-004.08 (1982), provided:

> NMAP covers medical procedures and abortions only when the life of the mother would be endangered if the fetus were carried to term. A physician shall certify the diagnosis by medical reports which include the name and address of the client.

471 NAC 18-004.08.

Respondents G. William Orr and Womens Services P.C., thereafter initiated their suit in the United States District Court for the District of Nebraska. Respondents invoked the court's jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and U.S. Const. Art. VI, cl. 2, alleging that Neb. DPW Program Manual § 18-004.08 (1992) violated the Supremacy Clause of the United States Constitution because said provision was inconsistent with the 1994 Hyde Amendment. Petitioners filed an Answer controverting the Respondents' interpretation of the 1994 Hyde Amendment. Respondents filed a Motion for Summary Judgment, which was granted by the District Court. The court permanently enjoined the Petitioners from enforcing Neb. DPW Manual § 18-004.08. (App. 32).

Petitioners thereafter initiated an appeal to the United States Court of Appeals for the Eighth Circuit. Upon a Joint Motion for Consolidation, the case was consolidated with Case No. 94-2885EA, *Little Rock Family Planning Services v. Dalton*. Oral argument was had on April 4, 1995. On July 25, 1995, the Eighth Circuit affirmed the district court's decision, holding that States are obligated by Title XIX to fund all medically necessary abortions for which federal reimbursement is available, and furthermore, that the Hyde Amendment substantively amended Title XIX's funding requirements. Petitioners also note that the issue presented in the present case has also been raised by the Petitioner in Docket 95-701, *Weil v. Hern*.

REASONS FOR GRANTING THE WRIT

This case involves an important question of federal law which has not been, but should be, settled by this Court. The implications of the decision rendered by the Eighth Circuit, as well as the other circuit courts which have addressed this issue, go far beyond the issue of abortion funding. Furthermore, two Circuit Courts of Appeals have split down the middle when requested to review panel decisions on the basis that the panel decisions were contrary to Supreme Court precedent.

The decision below provides precedential authority for the proposition that whenever Congress makes federal Medicaid funding for a particular service or procedure available, States are therefore compelled to pay for that service or procedure as well. This holding directly conflicts with the broad discretion given to the States under the Medicaid Act "to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable and consistent with the objectives' of the Act." *Beal v. Doe*, 432 U.S. 438, 444 (1977). Indeed, this Court has never held that States must fund all services for which federal reimbursement is made available. States, pursuant to the decision below, could be forced to fund services other than abortion simply because Congress elects to make funding available for a particular service, notwithstanding the discretion left to the States under the Act.

This question of whether States which participate in the Medicaid program are required to use State funds to pay for the cost of all services or procedures for which federal matching funds are merely available presents an important question of federal law which should be decided by this Court.

The Court should also address the important question presented as to the cognizability of Supremacy Clause claims under 42 U.S.C. § 1983. Confusion and disagreement among the Circuit Courts and District Courts in reconciling *Suter v. Artist M.*, 503 U.S. 347

(1992) with earlier precedent abounds, and has been openly referenced by numerous courts. The Court should now clear up the considerable confusion among the lower courts and affirm that § 1983 is not available as a remedy to individuals in Supremacy Clause cases.

Question 1

Whether States, by virtue of their participation in the Medicaid program, are required to use their own funds to pay for the cost of every medically necessary service, including abortion, for which federal funds are made available.

I.

THE EIGHTH CIRCUIT'S OPINION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. The Eighth Circuit's holding fails to recognize States' authority under the Medicaid Act to fashion State plans which are reasonable and consistent with the objectives of the Medicaid Act.

The Eighth Circuit held that States must provide all medically necessary services whenever federal funds are available. There is nothing in the Medicaid Act, however, which suggests that States are required to fund every procedure that falls within the delineated categories of medical care.

Medicaid is a cooperative federal-state program under which federal financial assistance is given to States that choose to reimburse certain costs of medical treatment for needy applicants. Medicaid was authorized by Congress in 1965 when it enacted Title XIX of the Social Security Act, commonly known as the Medicaid Act.

The "primary purpose" of the Medicaid Act (42 U.S.C. § 1396 *et seq.*) is "to enable each State, as far as practicable, to furnish medical assistance to individuals

whose income and resources are insufficient to meet the costs of necessary medical services." *Beal v. Doe*, 432 U.S. at 444 (citing 42 U.S.C. § 1396 (1992)). As a condition of federal funding under Title XIX, a state plan must provide financial assistance to the "categorically needy" with regard to seven general categories of medical treatment, including physicians' services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21) (1994 Supp.).

Under this program of "cooperative federalism," *King v. Smith*, 392 U.S. 309 (1968), a State pays for medical assistance rendered pursuant to its Medicaid plan, and is then reimbursed by the federal government in accordance with a formula for that percentage of the payment that the federal government is obligated to pay for the services rendered. **Nothing in Title XIX requires participating States to fund every procedure that falls within the delineated categories of medical care**. *Beal*, 432 U.S. at 444. Title XIX provides: "A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title]." 42 U.S.C. § 1396a(a)(17) (1994 Supp.). This Court explained that "[t]his language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal*, 432 U.S. at 444.

In addition to the requirements of "reasonableness" and "consistency," Title XIX also requires that medical assistance be equitably distributed among the beneficiaries of the Medicaid program. 42 U.S.C. § 1396a(a)(10)(B) (1994 Supp.). Specifically, "the medical assistance made available to any [categorically needy] individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." *Id.*, § 1396a(a)(10)(B)(i) (1994 Supp.). *See also* 42 C.F.R. § 440.240(b)(1) (Oct. 1, 1993 ed.). The implementing regulation provides that a "Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a

required service . . . to an otherwise eligible individual solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c) (Oct. 1, 1993 ed.). The same regulation, however, provides further that "appropriate limits" may be placed on a service "based on such criteria as medical necessity . . . . " *Id.* § 440.230(d) (Oct. 1, 1993 ed.). To summarize, these statutory and regulatory provisions lead to two conclusions:

> First, the participating state may select those procedures which it will fund under the Medicaid program and may determine the extent to which those procedures will be funded, placing "appropriate limits" on the services offered. Second, the discretion of the participating state is limited only by three factors: (1) the plan or standard adopted by the state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX.

D.R. v. Mitchell, 456 F.Supp. 609, 617-18 (D. Utah. 1978), *reversed on other grounds*, 617 F.2d 203 (10th Cir. 1980).

B. The Eighth Circuit's holding, as well as the recent decisions of the other circuit courts which have addressed this issue, cannot be reconciled with prior cases addressing this issue.

Under the Eighth Circuit's analysis, States would be forced to pay for the costs of any service or procedure for which Congress decides to provide funding, regardless of whether a State's refusal to pay for said service is reasonable and consistent with the objectives of the Medicaid Act. To support their position, the Eighth Circuit, as well as other circuit courts that have addressed this issue, *see Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995); *Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995), have used as precedent a line of cases which were decided in 1979 and 1980. *See Hodgson v. Board of County Commissioners*, 614 F.2d 601 (8th Cir. 1980); *Zbaraz v.*

Quern, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied*, 441 U.S. 952; *Roe v. Casey*, 623 F.2d 829 (3rd Cir. 1980). All of these cases, however, were decided before this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), and prior to the decision of Congress to restrict Medicaid funding of abortions to cases where it was necessary to save the life of the mother. Although the present circuit court cases hold that the Medicaid Act demands that States must provide any and all medically necessary services to eligible clients, all of the earlier cases reject that sweeping interpretation. Indeed, the *Hodgson, Zbaraz,* and *Preterm* line of cases recognize that States have substantial discretion to fashion plans for medical assistance for their own circumstances.[1]

In *Preterm*, 591 F.2d 121 (1st Cir. 1979), the Hyde Amendment at that time allowed federal funding for abortions in cases of rape, incest, to save the life of the mother or to prevent severe and long lasting damage to the mother's physical health. Massachusetts, however, provided funding for all such abortions except those in the latter category. Plaintiffs challenged Massachusetts' failure to pay for such abortions, arguing that the Medicaid Act required states to pay for all medically necessary abortions whenever federal funds were available, therefore, establishing a floor or minimum level of services. Massachusetts countered that "states are afforded great latitude in deciding which services will be furnished

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[1] Petitioners' contention that there is an irreconcilable conflict between the *Hodgson, Preterm* line of cases and the recent cases which have addressed this issue is in no way meant to signify that Petitioners agree with the decision rendered in *Hodgson, Preterm,* etc. Petitioners only wish to point out that in *Hodgson* and *Preterm,* the courts at least framed the question presented correctly – that being, whether the abortion funding restrictions at issue were reasonable and consistent with the objectives of the Medicaid Act.

under their plans, and maintain[ed] that the Act nowhere requires a state to provide all 'medically necessary' services." 591 F.2d at 124.

The court noted that 42 U.S.C. § 1396a "is the provision which details the required contents of a state plan for medical assistance. Among the 37 items listed, we find no mandate that all 'medically necessary' services be provided." 591 F.2d at 124-25. After reviewing *Beal v. Doe*, 432 U.S. 438 (1977), the court said *Beal* did not create "a flat rule that all services within the five general categories deemed 'medically necessary' by a patient's physician must be provided by the state plan." 591 F.2d at 125. Instead, the court held it would review the State's decision regarding the medical services offered under its plan to determine whether they were "reasonable" and "consistent with the objectives of the Medicaid Act." *Id.* at 125-26.

The court did not rule that the state must fund all medically necessary abortions, but struck down the policy pursuant to the equality of benefits requirement. The court held that "[W]hen a state singles out one particular medical condition – here a medically complicated pregnancy – and restricts treatment for that condition to life and death situations, it has . . . crossed the line between permissible discrimination based on medical condition." *Id.* at 126. The holding in *Preterm* does not comport with the claim that the states must fund all medically necessary services whenever federal funds are available.

If the *Preterm* court had intended to rule in favor of the plaintiffs on such grounds, it would merely have held that because federal funds were available, the State was required to pay for such abortions. Instead, the *Preterm* court analyzed the contested limitations on abortion funding to determine whether they were reasonable and consistent with the Medicaid Act. The court held that the exclusion of abortion funding in the state's Medicaid Plan was unreasonable.

In *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), plaintiffs brought a class action suit seeking to enjoin the State

of Illinois from enforcing a statute restricting funding of abortions in all cases except those necessary to save the life of the mother. Plaintiffs argued that Title XIX required the state to fund all medically necessary abortions. In reaching its conclusion, the court agreed with the finding of the court in *Preterm* that Title XIX did "not require funding of all medical care which is deemed 'necessary' by the treating physician, . . . " *Id.* at 198. It further held, however, that the State's exclusion of payment for abortions in cases of rape, incest and serious physical harm to the mother was unreasonable. *Id.* at 199. The court did not explain exactly why the failure to fund such abortions was violative of the Medicaid Act, and it also ignored the State's interest in protecting unborn human life. *See Planned Parenthood v. Casey,* 112 S. Ct. 2791 (1992).

Hodgson dealt with a Minnesota statute which allowed payment for abortions only to save the life of the mother, and in cases where the pregnancy resulted from rape or incest. The Hyde Amendment in force at that time also allowed for payment for abortions to prevent long lasting physical damage to the mother. The Eighth Circuit acknowledged that "Minnesota's refusal to subsidize medically necessary abortions may or may not be 'reasonable' under *Beal,*" but struck down the policy under the equality of benefits requirement of Title XIX. The Court **did not** hold that the states must fund all medical services for which federal reimbursement is necessary. *Id.* at 607-08 n.11.

Roe v. Casey, 623 F.2d 829 (3rd Cir. 1980) is the last of the four decisions relied upon. In *Casey,* Pennsylvania, akin to the situation in Illinois in the *Zbaraz* case, did not provide funding for abortions in cases of rape or incest. Once again, the court refused to hold that states must fund all medically necessary services, *see id.* at 832-33, but concluded, without analysis, that "Title XIX, as now modified [by the Hyde Amendment], requires the States to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest." *Id.* at 836.

There is, therefore, an irreconcilable conflict between this case (as well as *Hope Medical Group* and *Hern*), and the *Hodgson-Preterm* line of cases. The prior line of cases certainly cannot be read to support the proposition that States must provide all medically necessary services whenever federal funds are available.

C. The Eighth Circuit's ruling incorrectly presupposes that the States have an obligation to fund abortions pursuant to Title XIX.

The correct inquiry in the present case is whether the abortion funding limitation imposed by Nebraska is reasonable and consistent with the objectives of the Medicaid Act. The Petitioners submit that their position is buttressed by this Court's opinion in *Beal v. Doe*, 432 U.S. 438 (1977). The Plaintiffs in *Beal*, Medicaid eligible women under Pennsylvania's state plan, were denied financial assistance for desired non-therapeutic abortions pursuant to Pennsylvania regulations limiting such assistance to those abortions that were certified by physicians as medically necessary. The question before the Court was whether Title XIX required Pennsylvania to fund under its Medicaid program the cost of all abortions that were permissible under state law.

The Court rejected the argument that it was unreasonable for Pennsylvania not to fund non-therapeutic abortions. In so doing, the Court began its analysis by reviewing the plain language of Title XIX. It noted that Title XIX made no reference to abortions. "Instead, the statute is cast in terms that require participating States to provide financial assistance with respect to five broad categories." *Id.* at 444. It found, however, that "nothing in the statute suggests that participating States are required to fund every necessary medical procedure that falls within the delineated categories of medical care." *Id.* The Court further stated that under the language of the Medicaid Act, the States had broad discretion to adopt standards for determining the extent of medical assistance,

requiring only that such standards be reasonable and consistent with the objectives of the Act.

The *Beal* court also held that "the State has a valid and important interest in childbirth." *Id.* at 445. Although this interest in protecting the "potentiality" of unborn human life "does not . . . become sufficiently compelling to justify unduly burdensome state interference with a women's constitutionally protected privacy interest" until viability, "it is a significant interest existing throughout pregnancy." *Id.* at 446. The Court concluded:

> Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth. Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.

The Court opined that its interpretation of Title XIX was reinforced by the fact that Title XIX was enacted at a time when the only abortions generally allowed in any State were those done to save the life of the mother. No abortions were allowed in the cases of rape or incest. The Court noted in view of the fact that non-therapeutic abortions were unlawful when Congress passed the Medicaid in 1965, "the contention that Congress intended to require – rather than permit – participating States to fund non-therapeutic abortions requires far more convincing truth than [plaintiffs] have offered." *Id.* at 446.

In *D.R. v. Mitchell*, 456 F.Supp. 609 (D. Utah 1978), *reversed on other grounds*, 617 F.2d 203 (10th Cir. 1980), the district court discussed at length the term "non-therapeutic" as it related to abortion. The district court concluded that the term non-therapeutic, as that term was used in *Beal*, referred to those abortions which were unlawful in

most states prior to the Supreme Court's decision in *Roe v. Wade*. The *Mitchell* court concluded:

> Thus, reading *Roe* and *Beal* together it is evident that the Court's view is that "therapeutic" abortions under Title XIX are those necessary to, in effect, save the life of the mother, and that "non-therapeutic" abortions are those abortions that are performed for a less compelling reason.

456 F.Supp. at 623. A restricted reading of the word "non-therapeutic" is thus warranted.

Several other circuit courts which addressed Medicaid abortion funding echoed the Court's sentiments in *Beal*. *See Roe v. Norton*, 522 F.2d 928, 935 (2nd Cir. 1975) (In light of the circumstances and conditions at the time Title XIX was enacted, it cannot be supposed that Congress, in 1965, intended the states to provide coverage for a procedure which was illegal in a majority of states). *Accord Roe v. Ferguson*, 515 F.2d 279, 282-83 (6th Cir. 1975) ("[t]here is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the women at a time when the performance of such abortions was illegal in most jurisdictions.").

Reduced to its essence, the Eighth Circuit's holding is that because the Hyde Amendment **allows federal funding** for rape and incest Medicaid abortions, it therefore **requires state funding** of such abortions as well. The *Beal* court rejected this very rationale:

> Respondents rely heavily on the fact that in amending Title XIX in 1972 to include "family planning services" within the five broad categories of required medical treatment, see n.2, *supra*, Congress did not expressly exclude abortions as a covered service. Since Congress had expressly excluded abortions as a method of family planning services in prior legislation, see 42 U.S.C. § 300a-6, respondents conclude that the failure of Congress to exclude coverage of

> abortions in the 1972 amendments to Title XIX "strongly indicates" an intention to **require** coverage of abortions. ***This line of reasoning is flawed. The failure to exclude abortions from coverage indicates only that Congress intended to allow such coverage, not that such coverage is mandatory for nontherapeutic abortions.***

432 U.S. at 446, n.10 (emphasis added).

Thus, the fact that Congress did not specifically exclude abortion coverage when it added family planning coverage did not indicate a Congressional intent to require coverage of abortion.

This Court has never sanctioned the proposition essential to the Eighth Circuit's holding – that is, that Title XIX requires abortion funding.

D. This Court has not expressly addressed the issue presented in this case and has implicitly rejected the contention that the Hyde Amendment substantively amended Title XIX.

This Court has not expressly addressed the issue presented in this case. *See Harris v. McRae*, 448 U.S. 297, 310 (1980); *Williams v. Zbaraz*, 448 U.S. 358, 363 (1980). In fact, Justice Scalia noted, in his capacity as Circuit Judge for the Fifth Circuit, that the issue of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment, was potentially worthy of certiorari. *See Edwards v. Hope Medical Group for Women*, 115 S. Ct. 1 (Scalia, Circuit Justice 1994).

Petitioners also submit that this Court's ruling in *Harris* was an implicit rejection of the idea that the Hyde Amendment is a substantive amendment to Title XIX.[2] In

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[2] Petitioners submit that the Hyde Amendment is a prohibition on federal funding of abortions, not a mandate that States

Harris, the question presented was whether Title XIX requires a state that participates in the Medicaid program to fund the costs of medically necessary abortions for which federal reimbursement is unavailable. The district court held that the Medicaid Act required the funding of medically necessary abortions, but that the Hyde Amendment was a substantive amendment to the Medicaid Act relieving states of the obligation to fund abortions except where federal funds were available. The Supreme Court noted that it agreed with the district court, "but for somewhat different reasons." 448 U.S. at 308. Instead, the Court said the Medicaid Act itself relieves the states of any obligation to fund medical services when federal matching funds are not available. By using this analysis, the Court carefully avoided any suggestion that would imply the states were required to fund abortions under the Medicaid Act. Certainly, the Court's decision cannot be read to endorse the holding of *Hodgson* and the other circuit courts that some provision of the Medicaid Act requires the states to pay for abortions in order to receive federal Medicaid funds. Indeed, the court found that Congress' authorization of "reimbursement for medically necessary abortions" was "rationally related to the legitimate governmental objective of protecting potential life" and "encouraging childbirth." 448 U.S. at 325.

Petitioners note that the version of the Hyde Amendment at issue in *Harris* provided abortion funding to preserve the life of the mother but **not** to prevent serious physical harm to the mother. In other words, the version

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pay for abortions which are delineated in the Hyde Amendment. States which voluntarily determine to fund abortions may only receive federal reimbursement for abortions to save the life of the mother or in cases where the pregnancy resulted from an act of rape or incest. Nothing in the Hyde Amendment or Title XIX, purports to place any obligation on States to fund abortion. At the time the 1994 Hyde Amendment was passed, over 30 States had provisions either constitutional, statutory, or via regulation, prohibiting payment for rape and incest abortions.

of the Hyde Amendment at issue in *Harris* itself discriminated on precisely the same basis the *Hodgson* court found to be inconsistent with the Medicaid Act. The Supreme Court nevertheless upheld the funding restriction while holding the Hyde Amendment did not substantively amend the Medicaid Act. This strongly suggests that the Supreme Court does not believe that the Medicaid Act requires states to fund abortions. The Petitioners thus submit that explicit guidance regarding this important question of federal law is needed, and that the Court should therefore grant the petition.

E. There is a lack of unanimity within the circuits regarding this issue.

Although there is technically no split in the circuits with respect to the issue presented, it is clear there is a lack of unanimity and understanding regarding this question. The Eighth Circuit narrowly rejected Petitioner's Motion for Rehearing with Suggestion for Rehearing En Banc by a vote of 6 to 5. In the Third Circuit, there was also a 7 to 7 split, albeit the issue in the Pennsylvania case is slightly different than the question presented here. *Elizabeth Blackwell Health Center for Women v. Knoll,* 61 F.3d 170 (3rd Cir. 1995). In any event, the close votes on the rehearing motions indicates that the issue of whether States, by virtue of their participation in the Medicaid program, are required to pay for the cost of every medically necessary procedure or service for which federal funds are available, is, at best, unsettled and should be addressed by this Court.

F. The Petitioners incorporate and adopt the arguments made by the Petitioner in Docket Number 95-701.

Question 2

Whether 42 U.S.C. § 1983 may be used to secure a remedy in this or any Supremacy Clause case.

II.

THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *SUTER V. ARTIST M.* IN THAT IT RECOGNIZES A SECTION 1983 CLAIM BASED ON A JUDICIAL INTERPRETATION OF AN AMENDMENT TO AN APPROPRIATIONS BILL WHICH CONTAINS NO SPECIFIC OR MANDATORY LANGUAGE DIRECTED AT STATES.

A. The Supremacy Clause does not Secure Rights Enforceable Within the Meaning of § 1983.

The Respondents are not seeking direct enforcement of a federal statute,[3] but rather seek to nullify a State law which they assert is preempted by an amendment to an appropriation bill which contains no language directed at States – mandatory or otherwise. The Hyde Amendment simply does not secure a right, privilege, or immunity to the Respondents within the meaning of § 1983.[4]

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[3] Since *Maine v. Thiboutot*, 448 U.S. 1 (1980) § 1983 has been available as a remedy for violations of federal statutes as well as for constitutional violations. However, the availability of § 1983 to enforce federal statutes is limited. *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987). Furthermore, when enforcement is sought of federal statutory provisions which are conditions placed on receipt of federal funds by states, the conditions must be unambiguously imposed to be enforceable under § 1983. *Suter v. Artist M*, 503 U.S. 347 (1992).

[4] Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983.

Section 1983 was not intended to give a cause of action to individuals where the only "wrong" committed by a State is misapprehending the precise location of the boundaries between State and Federal power. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 114 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J. and O'Connor, J.). The Supremacy Clause is a power conferring provision that allocates authority between the federal and state governments. It does not secure rights, privileges, or immunities to individuals. *Id.*

In *Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 469 U.S. 834 (1984), the Eighth Circuit stated "**the Supremacy Clause does not secure rights within the meaning of § 1983 . . .**", *Id.* at 1144 (emphasis added). The reasoning employed in *Consolidated Freightways* was followed by numerous other federal courts which held that **supremacy clause claims are not cognizable under § 1983.**[5] These decisions were once thought to be effectively overruled by *Golden State*

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[5] *See, e.g., Maryland Pest Control Ass'n v. Montgomery County, Md*, 884 F.2d 161, 163 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987), appeal after remand 873 F.2d 1277 (1989) ("preemption of state law under the Supremacy Clause – being grounded not on individual rights but instead on considerations of power – will not support an action under section 1983"); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1477 (10th Cir. 1985); *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F.Supp. 423, 435-436 (N.D. Ill. 1985), aff'd 826 F.2d 1068 (7th Cir. 1987); *White Mountain Apache Tribe v. Williams*, 798 F.2d 1205 (9th Cir. 1985), *withdrawn* and *amended*, 810 F.2d 844 (9th Cir.), *cert. denied*, 479 U.S. 160 (1987); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 748-749 (E.D. Wash. 1985), *aff'd* 828 F.2d 529 (9th Cir. 1987), *cert. granted*, 487 U.S. 1204 (1988), *aff'd in part, rev'd in part on other grounds*, 492 U.S. 408 (1989), *reh'g denied*, 492 U.S. 937 (1989); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor* 750 F.2d 608, 615-616 (7th Cir. 1984), *aff'd* 475 U.S. 282 (1986). *See also Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 585-587 (D.R.I. 1983).

Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) (*Golden State II*). However, *Golden State II* is now of questionable validity as to the cognizability of Supremacy Clause claims under § 1983.

In *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (a non-supremacy clause case), the Court narrowly held, on a 5-4 vote, that § 1983 could be used to bring suit under the Boren Amendment. The next year, (two years after *Golden State II*), in a case involving the State of Nebraska, the Court abrogated the Eighth Circuit's decision in *Consolidated Freightways*, but only as to the **Commerce Clause**. *Dennis v. Higgins*, 498 U.S. 439 (1991). The Court distinguished the Commerce Clause from the Supremacy Clause, and noted that "An additional reason why **claims under the Supremacy Clause**, unlike those under the Commerce Clause, **should be excluded from the coverage of § 1983** is that if they were included, the 'and laws' provision in § 1983 would be superfluous." *Id.* at 450 n.8 (emphasis added).

Consistent with the discussion of the Supremacy Clause in *Dennis*, the Court had denied certiorari the previous year (the year **after** *Golden State II*) in *Maryland Pest Control v. Montgomery County, Md.*, 884 F.2d 161, 163 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990). In that case, the circuit court expressly held that § 1983 was not available as a remedy to Supremacy Clause litigants.

Finally, in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court held that § 1983 was **not** available to enforce a violation of the Adoption Assistance and Child Welfare Act of 1980. A review of *Suter* and *Golden State II* clearly shows that *Suter* overruled *Golden State II*, in at least some important aspects.[6] Most importantly, the following portion of *Golden State II* was clearly overruled by *Suter*:

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[6] Numerous courts have commented on this point: "*Suter* weakened earlier precedent in vital respects . . . . " *Howe v. Ellenbecker*, 8 F.3d 1258, 1262, n.5 (8th Cir. 1993); "The Supreme Court's decision in *Suter v. Artist M.* has substantially changed the landscape of section 1983 law." *Beth V. by Yvonne V. v. Carroll*,

> A rule of law that is the product of judicial interpretation of a vague, ambiguous or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute.

Golden State Transit v. City of Los Angeles, 493 U.S. at 112. In direct contrast, **under *Suter* judicial interpretations of ambiguous statutes do not give rise to rights enforceable under § 1983.** Courts must now look for specific and mandatory terms in the provision in question. *Howe v. Ellenbecker*, 8 F.3d 1258, 1262 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1373 (1994); *Evelyn V. v. Kings County Hosp. Center*, 819 F.Supp. 183, 195 (E.D.N.Y. 1993) ("Nothing in [the statute] mandates any action by [the defendants]. Thus, it cannot serve as the basis for a § 1983 statutory claim against these defendants.") (citing *Suter*, 503 U.S. at 358). This critical distinction between *Golden State II* and *Suter* was most clearly stated in *Sobky v. Smoley*, 855 F.Supp. 1123 (E.D. Cal. 1994). In that case, the court stated, "**After *Suter*, the critical inquiry focuses on the specificity of the statutory language; the court must examine exactly what is required of States by the enactment.**" *Id.* at 1131 (citing *Suter*, 503 U.S. at 358). The Eighth Circuit panel below clearly failed to comply with *Suter*, and instead followed the overruled portion of

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876 F.Supp. 1415, 1435 (E.D. Pa. 1995); "[T]he Court silently overruled years of jurisprudence under section 1983, shifting the burden on the plaintiff to prove that the statutory provision at issue confers a private remedy as well as private right." *Id.* at 1436; "[I]n *Suter v. Artist M* [citation omitted], the Court appears to have modified the *Wilder* test, or arguably to have abandoned it altogether." *E.F. v. Scafidi*, 851 F.Supp. 249, 251 (S.D. Miss. 1994); "[T]he *Golden State/Wilder* framework has since been called into question (if not abandoned) by the Supreme Court." *Eric L. By & Through Schierberl v. Bird*, 848 F.Supp. 303, 308 (D.N.H. 1994) (citing *Suter*).

Golden State II quoted above. If the decision below is allowed to stand, then *Suter* is meaningless.

Finally, at a more fundamental level, the holding in *Golden State II* simply exceeds the intended purpose of § 1983. This Court should now clear up the considerable confusion among the lower courts and affirm that § 1983 is not available as a remedy to individuals in any Supremacy Clause case.[7]

B. Ambiguously Imposed Conditions on Receipt of Federal Monies Are Not Enforceable Under 42 U.S.C. § 1983.

Regardless of whether § 1983 provides a remedy for *any* Supremacy Clause claims, it is clear that preemption claims may not be brought under § 1983 to enforce an ambiguously imposed federal obligation. *Suter v. Artist M.*, 503 U.S. 347 (1992). Thus, unless the Hyde Amendment imposes an **unambiguous** mandatory obligation on the States to fund all abortions for which federal reimbursement is available, the Respondents' claim is not cognizable under § 1983. As recent federal court decisions have stated, "After *Suter*, the critical inquiry focuses on the specificity of the statutory language; the court must

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[7] Numerous federal courts have noted the confusion in this area of law: "Courts called upon to determine the applicability of a section 1983 remedy to enforce a statutory or regulatory scheme have struggled with [*Suter*] and its impact . . . . " *Methodist Hosp. v. Ind. Family & Social Services*, 860 F.Supp. 1309, 1321 n.2 (N.D.Ind. 1994); "[T]he law concerning whether federal statutes give rise to the right to sue under § 1983 has been in a state of change and uncertainty since [*Suter*]." *Martin v. Voinovich*, 840 F.Supp. 1175, 1193 (S.D. Ohio 1993); "Since *Suter*, lower federal courts have faced some difficulty in attempting to reconcile it with prior case law." *Id.* at 1194 (discussing the differing approaches taken by the various circuit courts of appeals); "Until further guidance is forthcoming, *Suter* and *Wilder* must be reconciled on some other basis than that *Suter* silently overrules *Wilder*." *Id.* at 1332.

'examine exactly what is required of states' by the enactment." *Sobky v. Smoley*, 855 F.Supp. at 1131 (E.D.Cal. 1994) (citing *Suter*, 503 U.S. at 358); "[N]ow a federal spending statute cannot be said to confer a right privately enforceable under § 1983 unless, at a minimum, the 'plain language' of the statute imposes a 'direct obligation' on the state, in favor of intended private beneficiaries." *Eric L. By & Through Schierberl v. Bird*, 848 F.Supp. 303, 311 (D.N.H. 1994) (citing *Suter*).

Here, the alleged federal obligation on the States is imposed via invisible ink in an amendment to an appropriation bill. Only when examined by HHS bureaucrats does the alleged obligation become evident. *See Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d at 185 ("[T]he majority holds that, by the simple expedient of writing a letter, a subcabinet-level federal bureaucrat can preempt the statutory enactment of an elected state legislature.") (Nygaard, J., dissenting).

The Eighth Circuit panel's conclusion that the 1994 Hyde Amendment imposed an **unambiguous** mandatory obligation on the states to fund abortions under Medicaid in the case of rape or incest was premised on its finding that **other courts** have **"construed"** Title XIX to require states participating in the Medicaid program to fund medically necessary abortions unless proscribed by the Hyde Amendment. 60 F.3d at 502. This analysis tracks perfectly with *Golden State II*, 493 U.S. at 112 ("a rule of law that is the product of judicial interpretation of a vague, ambiguous or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute"). However, it is directly at odds with *Suter*. *Sobky*, 855 F.Supp. at 1131 (the critical inquiry is the specificity of the statutory language); *Maynard v. Greater Hoyt School Dist. No. 61-4*, 876 F.Supp. 1104, 1107 (D.S.D. 1995) ("[A] Section 1983 action is created where Congress intends the statute to benefit persons like the plaintiffs

through the imposition of mandatory and direct obligations on the state.").

As discussed below, even if § 1983 may sometimes provide a remedy in Supremacy Clause cases, the lower court's reasoning here is flawed in several respects. First of all, the court's analysis contains an analytical gap. *Suter* requires that a federal obligation be imposed **unambiguously** in order for relief to be available under 42 U.S.C. § 1983. *Suter*, 503 U.S. at 356. Even assuming, arguendo, that the failure of Congress to **explicitly prohibit** expenditure of funds for certain abortions somehow created a mandatory obligation on states to pay for such abortions, this in no way means the obligation has been imposed **unambiguously**. Nonetheless, the Eighth Circuit concluded an "unambiguous" obligation was imposed by the **Hyde Amendment**, based solely on the fact that certain prior judicial interpretations of **Title XIX** declared the **existence** of a funding obligation. The gap in the court's reasoning is unbridgeable. There is a big difference between finding that an obligation exists, and finding that it was imposed unambiguously. The distinction goes to the heart of the *Suter* test.

It seems inconceivable that a mandate imposed via the **absence** of certain language in an amendment to an **appropriations** bill is the type of unambiguously imposed federal obligation which gives rise to § 1983 relief under *Suter*. On the contrary, an obligation imposed in such a circuitous manner would seem to be the very type of federal obligation the Court had in mind in *Suter* when it limited the availability of relief under § 1983.

The gap in the lower court's analysis must be filled by examining the "statutory" language in question. The following discussion will separately examine the Hyde Amendment and Title XIX.

1. The Hyde Amendment Does Not Unambiguously Impose a Mandatory Obligation on The States to Fund All Abortions For Which Federal Reimbursement is Available.

Under *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court must determine whether the Hyde Amendment imposes an unambiguous mandatory obligation on the States to fund all abortions for which federal reimbursement is available. This inquiry goes well beyond even the *Golden State* requirement that the statute in question must create obligations "sufficiently specific and definite" to be within the competence of the judiciary to enforce. *See Golden State Transit v. City of Los Angeles*, 493 U.S. at 108.

In *Suter*, the Court held that the Adoption Act does not confer on its beneficiaries a private right enforceable in a § 1983 action. In so holding, the Court found that the Act did not create an enforceable right within the meaning of § 1983. In *Suter* the Court placed new emphasis on a key factor in determining whether an enforceable right exists within the meaning of § 1983 – that is whether the obligation in question has been imposed **unambiguously**. The Court stated:

> "The legitimacy of Congress" power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Suter, 503 U.S. at 356 (*quoting Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)).

In analyzing whether Congress had unambiguously imposed an obligation under the Adoption Act so as to create an enforceable right under § 1983, the court looked to the actual language of the federal law in question. The court concluded, "Careful examination of the language

relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 363. Consequently, the Respondents herein cannot obtain relief for their Supremacy Clause claim under § 1983 unless the alleged federal obligation to pay for abortions was **unambiguously** imposed on the States.

The State of Nebraska respectfully submits that if the Respondents have succeeded in showing an unambiguously imposed mandatory federal obligation under the facts of this case, then *Suter* is meaningless and requires nothing more than *Golden State*. However, this Court's holding in *Suter* is not meaningless verbiage and should not be disregarded.

a. The Hyde Amendment Contains No Mandatory Language Creating an Obligation on States to Fund Abortions.

As this Court has made abundantly clear, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Suter*, 503 U.S. at 356 (*quoting Pennhurst v. Halderman*, 479 U.S. at 423). As in *Suter*, the Court must carefully examine the actual "statutory" language relied upon by the Respondents. *Suter*, 503 U.S. at 363. The court below could not point to any statutory language, and purports to rely only on past court interpretations as to state obligations under Title XIX. This is a house of cards. Under *Suter*, the Court must examine the Hyde Amendment (an amendment to an **appropriations** bill) to see whether "there is sufficient mandatory language in the statute to create a binding obligation on the State." *Arkansas Medical Soc., Inc. v. Reynolds*, 6 F.3d 519, 526 (8th Cir. 1993). In stark contrast to *Arkansas Medical Society*, where the federal provisions were "both introduced by . . . compulsory language . . . . ," *id.*, the Hyde Amendment contains no compulsory

language relating to the States. In fact, examination of the Hyde Amendment leads to the inescapable conclusion that it is not a mandate on the States at all, but rather a limitation on the expenditure of **federal** funds.

The Court will find no language which "sets forth a congressional command" to the States in the Hyde Amendment. It simply forbids federal funds from being spent for abortions except where necessary to save the life of the mother or in cases of rape or incest. It contains no language to the effect that States must pay for abortions whenever federal matching funds are available. Indeed, the Hyde Amendment does not mention the States at all.

If Congress had desired to establish an obligation upon the States for receipt of federal funds, it should have set forth within the Hyde Amendment mandating language for covered services. It did not do so. The use of the word "shall" is also notable. It appears before "be expended" to make absolute that no funds can be used for any abortion. When the exceptions are set out, however, the term "shall" is not present. The amendment simply does not state that States must pay for abortions when the pregnancy is the result of an act of rape or incest. Considering the purpose of the Hyde Amendment as expressed in its plain language, it is a grant of authority rather than a mandate to the States. In other words, Medicaid coverage of abortion, in the cases of rape or incest, appears on the face of the amendment to be permissive rather than mandatory. **Congress has not unambiguously required states participating in Medicaid to use state funds to pay for abortions.**

Whereas Congress has not unambiguously required States to use State funds to pay for all abortions for which federal matching funds are available, the *Suter v. Artist M.* analysis requires the Court to find that the Hyde Amendment language on which the Respondents' claim is based does not create an enforceable right within the

meaning of § 1983. *Suter*, 503 U.S. at 357. Consequently, the Respondents have no cognizable claim under § 1983.

b. The Illusory Mandate in the Hyde Amendment Fails the "Unambiguous" Requirement by Definition.

The Respondents' assertion that the Hyde Amendment imposes an unambiguous mandatory obligation on the States to fund abortions utilizes the same method once used to weave a legendary monarch's royal raiment. The State of Nebraska respectfully submits that the "Emperor" has no clothes.

Black's Law Dictionary defines "unambiguous" as "**susceptible of but one meaning.**" Black's Law Dictionary, 5th ed. at 1366 (emphasis added). Likewise, Webster's defines "unambiguous" as "**clear, precise.**" Webster's New Collegiate Dictionary, 1974 ed. at 1271 (emphasis added). The **mere existence** of a mandate on States in the Hyde Amendment has been disputed by approximately eighteen (18) States,[8] as well as the Chief Sponsor of the Hyde Amendment itself, large numbers of Congressmen and Senators, and has even been denied by high ranking officials of the Clinton Administration. *See, e.g.*, Statement of Congressman Henry Hyde, Congressional Record of June 28, 1994, at p. 5261. Thus, it would be ludicrous to conclude that the alleged mandatory federal obligation has been imposed "unambiguously." The obligation, if it exists at all, fails the "unambiguous" requirement by definition, as it is not clear or precise, and is obviously susceptible of more than one meaning. This

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[8] Two Petitions for Writ of Certiorari (from the Eighth and Tenth Circuits) are now before the Court, and several more are likely to follow. Litigation regarding this issue has taken place all across the country, with a number of States still at various stages of litigation or appeal.

is precisely the type of federal mandate which *Suter* excludes from the parameters of § 1983.

2. Title XIX Does Not Unambiguously Impose a Mandatory Obligation on the States to Fund All Abortions For Which Federal Reimbursement is Available.

The Title XIX was adopted in 1965. The Act did not (and does not) mention abortion. In fact in 1965, abortions were prohibited in most, if not all, States. Clearly, Title XIX did not contemplate requiring States to pay for illegal abortions. The Medicaid Act has never been amended to require that states pay for abortions. The point here, however, is not to reargue the proper interpretation of Title XIX. Rather, the point is that there is no factual basis for concluding that a mandatory federal obligation on States to fund abortions has been imposed **unambiguously** by Title XIX.

CONCLUSION

The decision of the Court whether to grant review of the issues presented in this case will directly impact the majority of all States. Two Petitions for Writ of Certiorari on these issues are already before the Court, with more likely to follow. The Eighth and Third Circuit Courts of Appeals split down the middle when they were presented with Motions for Rehearing En Banc on the basis that panel decisions were contrary to Supreme Court precedent. For the reasons stated herein, the Petitioners

respectfully request the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2885

Little Rock Family Planning Services, P.A.; Curtis E. Stover, M.D.; Fayetteville Women's Clinic; Tom Tvedten, M.D., on behalf of themselves and the Medicaid-eligible women of the State of Arkansas to whom they provide health care,

Appellees,

v.

Thomas Dalton, Director of the Arkansas Department of Human Services, in his official capacity; Kenny Whitlock, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; Jim Guy Tucker, Governor of the State of Arkansas in his official capacity, and their successors,

Appellants.

Appeal from the United States District Court for the Eastern District of Arkansas

No. 94-3903

G. William Orr, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; Womens Services, P.C., Appellees, v. E. Benjamin Nelson, in his official capacity as Governor of the State of Nebraska; Donald Stenberg, in his official capacity as Attorney General of the State of Nebraska; Mary Dean Harvey, in her official capacity as Director of the Nebraska Department of Social Services, Appellants.	*	Appeal from the United States District Court for the District of Nebraska

Submitted: April 4, 1995

Filed: July 25, 1995

Before McMILLIAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

These cases were consolidated for purposes of appeal. In appeal No. 94-2885EA, Arkansas state officials (the Arkansas defendants) appeal from a final judgment entered in the United States District Court[1] for the Eastern District of Arkansas holding that an amendment to the Arkansas state constitution providing that no public funds will be used to pay for abortions except to save the life of the mother violated the 1994 Hyde Amendment and enjoining its enforcement. *Little Rock Family Planning Services v. Dalton*, 860 F. Supp. 609 (E.D. Ark. 1994) (*Dalton*). In appeal No. 94-3903NE, Nebraska state officials (the Nebraska defendants) appeal from a final judgment entered in the United States District Court[2] for the District of Nebraska holding that a Nebraska state regulation providing that no state funds will be used to pay for abortions except to save the life of the mother violated the 1994 Hyde Amendment and enjoining its enforcement. *Orr v. Nelson*, No. 4:CV94-3252 (D. Neb. Nov. 4, 1994) (*Orr*). For reversal the Nebraska defendants argue the plaintiffs' supremacy clause claim is not enforceable under 42 U.S.C. § 1983 and therefore the district court did not have subject matter jurisdiction. The Nebraska and Arkansas defendants argue on the merits that the Nebraska state regulation and the Arkansas state constitutional amendment do not violate the 1994 Hyde Amendment. For the reasons discussed below, we affirm both judgments.

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[1] The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

BACKGROUND FACTS

There are no material facts in dispute in either case. The following statement of background facts about the Medicaid program and the Hyde Amendments is taken in large part from the *Dalton* memorandum opinion.

Medicaid is a jointly funded, federal-state program designed to provide medical assistance to the poor. 42 U.S.C. §§ 1396-1396v (Title XIX of the Social Security Act of 1965). Although a state's participation in the Medicaid program is voluntary, "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985). "States choosing to participate in the Medicaid program may elect to provide medical services either to the 'categorically needy' only, or to both the "categorically needy" and the 'medically needy.' " *Dalton*, 860 F. Supp. at 615. "The 'categorically needy' are those who receive financial aid from certain specified federal aid programs; the 'medically needy' are those who do not qualify for some forms of federal assistance but who nonetheless lack the resources to obtain adequate medical care." *Id.* Arkansas and Nebraska provide services to both the categorically needy and the medically needy.

"Participating states must adopt a Medicaid plan explaining the state's eligibility requirements and the services that will be funded; the state plan must gain approval from the federal government." *Id.* Certain categories of medical care must be provided by every state Medicaid program; other categories are optional. Mandatory categories of medical care include inpatient hospital

services, outpatient hospital services, other laboratory and x-ray services, skilled nursing facilities, "early and periodic screening, diagnostic and treatment" services for persons under the age of 21, family planning services and supplies, and physicians' services. 42 U.S.C. § 1396d(a). "Abortion falls within several of the mandatory categories, including family planning services, physicians' services, outpatient hospital services, and inpatient hospital services." *Dalton*, 860 F. Supp. at 616. The state plan must cover medical services that a person's physician certifies are "medically necessary." *Id.* The Medicaid statute does not refer expressly to abortion; however, the Medicaid statute "does not identify *any* specific medical procedures, whether they are cesarean sections, transfusions, bypass surgery, or abortions." *Id.* "Because abortion falls within several of these mandated categories [of medical service], a medically necessary abortion is a mandatory covered service." *Id.*

Between 1973 and 1976 Medicaid covered medically necessary abortions. However, in 1976, Congress enacted the Hyde Amendment "prohibit[ing] *federal* reimbursements for abortions except for the categories that Congress declared medically necessary, which at that time included only cases where the 'life of the mother would be endangered if the fetus were carried to term.' " *Id.* at 617 (citation omitted) (emphasis added). "The [Hyde] Amendment does not restrict participating states' use of *state* funds to provide abortions through Medicaid or any other state program, as the states remain free to fund more abortions than those for which federal funds were

made available under the Hyde Amendment." *Id.* (citation and footnote omitted) (emphasis added). "A subsequent version of the [Hyde] Amendment expanded the [federal] funding to include victims of rape or incest and 'instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.' " *Id.* (citation omitted). "The fiscal year 1980 Hyde Amendment deleted the category regarding 'physical health damage' but still included the category for victims of rape or incest." *Id.* However, "[f]rom fiscal years 1982 to 1993 the Hyde Amendment limited medically necessary and thus federally funded abortions to cases where the mother's life was in danger." *Id.*

Then, in late 1993, Congress expanded the Hyde Amendment to include federal funding for abortions in cases of rape or incest as well as to save the life of the mother. The fiscal year 1994 Hyde Amendment provides that "[n]one of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest." The Departments of Labor, Health & Human Services, Education & Related Agencies Appropriations Act of 1994, § 509, Pub. L. No. 103-112, 107 Stat. 1082, 1113 (1993). In December 1993 the federal government advised state Medicaid directors that, effective October 1, 1993, state Medicaid plans must cover abortions for victims of rape or incest in addition to abortions necessary to save the life of the mother. Since at least 1982, pursuant to a

state regulation, the Nebraska Medicaid plan has covered "abortions only when the life of the mother would be endangered if the fetus were carried to term." Neb. Dep't Pub. Welfare Prog. Manual § 18-004.08. In 1988 the people of the state of Arkansas amended the state constitution to restrict state funding of abortions. Amendment 68 provides in part that "[n]o public funds will be used to pay for any abortion, except to save the mother's life." The Arkansas Medicaid plan reflects the state constitutional amendment. Arkansas and Nebraska each refused to amend or revise its state Medicaid plan to cover abortions for victims of rape or insect.

THE ARKANSAS CASE – *Little Rock Family Planning Service v. Dalton*

In the Arkansas case the plaintiffs are Little Rock Family Planning Services, a Medicaid provider, which operates a women's health care facility providing reproductive health care services, including abortions, to Medicaid-eligible women in Arkansas, its medical director, Dr. Curtis Stover, a licensed physician who provides medical services, including abortions, to Medicaid-eligible women, some of whom are pregnant as a result of rape or incest, and Fayetteville Women's Clinic and Dr. Tom Tvedten, who provide services similar to those provided by Little Rock Family Planning Services and Dr. Stover. Little Rock Family Planning Services and Dr. Stover sued on their own behalf and on behalf of the Medicaid-eligible women for whom they provide health care services. The defendants are Thomas Dalton, the director of the state department of human services, Kenny Whitlock, the deputy director of the division of the state department of human services that implements

the state Medicaid program, and Jim Guy Tucker, the governor of the state of Arkansas, each sued in his official capacity.

The plaintiffs filed an action for declaratory and injunctive relief alleging that the state constitutional amendment was inconsistent with the 1994 Hyde Amendment and thus preempted by federal law under the supremacy clause of the United States Constitution, art. vi, cl. 2. The plaintiffs filed a motion for summary judgment; the parties agreed, and the district court found, that there were no genuine issues of material fact in dispute. The district court, in an extensive memorandum opinion, found that there was an actual case or controversy, 860 F. Supp. at 614, the plaintiffs had standing to assert their rights and the rights of their patients, *id.*, the case was ripe for review, *id.* at 614-15, and, on the merits, that the state constitutional amendment was in conflict with federal Medicaid law, as amended by the 1994 Hyde Amendment, and thus invalid. *Id.* at 617-22. The district court relied upon four circuit court of appeals decisions which specifically held that federal Medicaid law requires states to fund abortions unless federal funding for those abortions is proscribed by the Hyde Amendment as long as the state participates in the Medicaid program. *Id.* at 618, *citing Roe v. Casey*, 623 F.2d 829, 831, 834 (3d Cir. 1980) (Pennsylvania law; Hyde Amendment in effect in 1980); *Hodgson v. Board of County Commissioners*, 614 F.2d 601, 611 (8th Cir. 1980) (*Hodgson*) (Minnesota law); *Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979) (Illinois law), *cert. denied*, 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126-27 (1st Cir.) (Massachusetts law), *cert. denied*, 441 U.S. 952 (1979). The district court also cited

several other decisions from other jurisdictions which reached similar results in cases specifically involving the 1994 Hyde Amendment. 860 F. Supp. at 620 (listing cases); *see also Hope Medical Group for Women v. Edwards*, 860 F. Supp. 1149, 1152 (E.D. La. 1994) (Louisiana law barring public funds for abortion except to prevent the death of the mother inconsistent with 1994 Hyde Amendment), *stay pending appeal denied*, No. 94-30445 (5th Cir. Aug. 16, 1994), *stay denied*, 115 S. Ct. 1 (Scalia, Circuit Justice 1994).

The district court also decided that it could not rewrite the state constitutional amendment in order to preserve its constitutionality, 860 F. Supp. at 622-25, and that the state constitutional amendment was not severable under state law. *Id.* at 625-28. The district court enjoined the enforcement of the state constitutional amendment, as well as the provisions of the state Medicaid plan related to abortion funding that are inconsistent with the Hyde Amendment, for so long as the state accepts federal Medicaid funds. This appeal followed.

THE NEBRASKA CASE – *Orr v. Nelson*

In the Nebraska case the plaintiffs are Womens Services PC, a Medicaid provider, and its president, Dr. G. William Orr, a licensed physician. Dr. Orr provides medical treatment, including abortions, to Medicaid-eligible women in Nebraska who are pregnant as a result of rape or incest. In July 1994 Dr. Orr submitted a Medicaid claim for an abortion for a woman whose pregnancy was the result of rape; the state department of social services denied the claim on the ground that Medicaid would not reimburse the claim. The defendants are E. Benjamin

Nelson, the governor of the state of Nebraska, Donald Stenberg, the state attorney general, and Mary Dean Harvey, the director of the state department of social services, each sued in his or her official capacity. Like the plaintiffs in *Dalton*, the Nebraska plaintiffs filed an action for declaratory and injunctive relief, alleging that the state regulation providing that no state funds will be used to pay for abortions except to save the life of the mother was inconsistent with the 1994 Hyde Amendment and thus preempted by federal law. The plaintiffs filed a motion for summary judgment; the parties agreed, and the district court found, that there were no genuine issues of material fact in dispute. The district court granted the motion for summary judgment in favor of the plaintiffs, holding that the 1994 Hyde Amendment preempts conflicting state law, declared the state regulation was invalid, and permanently enjoined the defendants from enforcing the state regulation. *Orr*, slip op. at 6-8 (citing other Hyde Amendment decisions involving other states, including the *Dalton* case). This appeal followed.[3]

SUMMARY JUDGMENT

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light

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[3] Subsequently the district court awarded the plaintiffs attorney's fees and expenses under 42 U.S.C. § 1988 in the amount of $5,456.08. *Orr v. Nelson*, 874 F. Supp. 998 (D. Neb. 1995). The appeal of the award of attorney's fees and expenses, No. 95-1555, was argued before the same panel as the appeal on the merits.

most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment a a matter of law. Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Insurance Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

42 U.S.C. § 1983 ENFORCEMENT

The Nebraska defendants first argue the plaintiffs' supremacy clause claim is not enforceable under 42 U.S.C. § 1983 and therefore the district court lacked subject matter jurisdiction. The Nebraska defendants argue that *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State*), has been abrogated by the subsequent decision in *Suter v. Artist M.*, 503 U.S. 347 (1992) (*Suter*). The Nebraska defendants also argue that, even if *Golden State* remains valid, the 1994 Hyde Amendment does not impose the "unambiguous mandatory obligation" required to create an enforceable federal right because the 1994 Hyde Amendment is an amendment to an appropriations act, which does not amend the Medicaid statute itself. The Nebraska defendants argue that the 1994 Hyde Amendment merely limits the use of federal funds to reimburse the states and does not impose an affirmative mandate on the states to expend state funds. The district court held that the plaintiffs' supremacy

clause claim is enforceable under 42 U.S.C. § 1983. *Orr v. Nelson*, 874 F. Supp. 998, 1001-04 (D. Neb. 1995).

We agree with the district court. This court rejected the abrogation argument in *Arkansas Medical Society v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (*Reynolds*). *Reynolds* concluded that "[f]irst, *Suter* did not create an analytical framework to replace *Golden State*. Second, *Suter* did not overrule *Wilder* [*v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (*Wilder*)]. Third, *Suter* placed great emphasis on the fact that rights must be 'unambiguously' conferred to be enforceable. And fourth, *Suter* emphasized that each statute must be examined on its own basis." 6 F.3d at 525; *see also Howe v. Ellenbecker*, 8 F.3d 1258, 1261-63 & n.5 (8th Cir. 1993) (noting that although *Suter* may have weakened earlier precedents, Supreme Court did not overrule *Golden State* and *Wilder*, so the better approach is to use *Wilder* framework, as articulated in *Suter*), *cert. denied*, 114 S. Ct. 1373 (1994). The first question, which is basically the first step of the *Golden State* test, has three subparts – first, whether the plaintiff is the intended beneficiary of the statute; second, whether "there is sufficient mandatory language in the statute to create a binding obligation on the state"; and third, "whether the statute's language is too vague and amorphous to enforce a right via § 1983." *Reynolds*, 6 F.3d at 525-27. The second question, which is basically the second step of the *Golden State* test, is whether Congress has foreclosed § 1983 enforcement. *Reynolds*, 6 F.3d at 528.

Applying this hybrid test, we agree with the district court that the plaintiffs can enforce the Medicaid statute, as amended by the 1994 Hyde Amendment, through 42 U.S.C. § 1983. 874 F. Supp. at 1003-04. The plaintiffs in

both these cases are Medicaid providers and Medicaid recipients; they are the intended beneficiaries of the 1994 Hyde Amendment because the amendment concerns, respectively, reimbursement and medical services. *Reynolds*, 6 F.3d at 526 (Medicaid providers and Medicaid recipients are intended beneficiaries of Medicaid provision). The 1994 Hyde Amendment contains sufficient mandatory language to impose a binding obligation on the states to fund certain abortions. Nor is the language of the Medicaid statute, as amended by the 1994 Hyde Amendment, too vague or amorphous to enforce through 42 U.S.C. § 1983. As discussed below, since 1980, numerous judicial decisions have consistently construed the federal Medicaid statute to *require* participating states to fund medically necessary abortions unless proscribed by the Hyde Amendment. These decisions have also consistently construed the 1994 Hyde Amendment, and the virtually identical 1977 Hyde Amendment, to *require* participating states to fund abortions to save the life of the mother and in cases of rape or incest. Finally, Congress has not foreclosed 42 U.S.C. § 1983 enforcement the Medicaid statute. *Wilder*, 496 U.S. at 520-23; *Reynolds*, 6 F.3d at 528.

MERITS

On the merits in each appeal the defendants argue the district court erred in holding the 1994 Hyde Amendment requires states to fund certain abortions under Medicaid. The Arkansas defendants argue the 1994 Hyde Amendment is an appropriations measure that merely prohibits the use of federal funds for certain medical

services. They argue the Hyde Amendment did not substantively amend the Medicaid statute and that if Congress wanted to amend the Medicaid statute to require the states to fund certain abortions, then Congress would have done so. The Nebraska defendants also argue this circuit's Hyde Amendment decisions, *Hodgson* and *Reproductive Health Services v. Freeman*, 614 F.2d 585 (8th Cir.) (*Freeman*), *vacated on other grounds*, 449 U.S. 809 (1980), were incorrectly decided and urge the court to reconsider those precedents in light of *Harris v. McRae*, 448 U.S. 297 (1980).

We must decline the defendants' invitation to overrule *Hodgson* and *Freeman*. "One panel of this Court is not at liberty to disregard a precedent handed down by another panel." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987).

In *Hodgson* this court rejected the defendants' arguments that the Hyde Amendment is merely an appropriations measure that did not substantively amend the Medicaid statute. In *Hodgson* we held that the Hyde Amendment in effect at that time which, like the 1994 Hyde Amendment banned federal funding for abortions except to save the life of the mother or in cases of rape or incest, "altered Title XIX's requirements, with the result that, as a statutory matter, [the state] need only finance those abortions contemplated by the Hyde Amendment." 614 F.2d at 605; *see also Freeman*, 614 F.2d at 591-92 (noting that *Hodgson* held that Hyde Amendment substantively amended the Medicaid statute). Contrary to the defendants' argument, in *Harris v. McRae* the Supreme Court expressly left the issue open. 448 U.S. at 312 n.14. Moreover, we agree with the Tenth Circuit that the Supreme

Court's analysis in *Harris v. McRae* supports the plaintiffs' basic premise that "the Hyde Amendment does not affect states' underlying obligations imposed by Title XIX and federal Medicaid regulations" to fund abortions for which federal reimbursement is available. *Hern v. Beye*, No. 94-1205, 1995 WL 339160, at *2-3 (10th Cir. June 8, 1995) (1994 Hyde Amendment) (Supreme Court in *Harris v. McRae* "construed the Hyde Amendment as indirectly modifying states' obligations under Title XIX").

As noted by the Tenth Circuit in *Hern v. Beye*, slip op. at *3-7, every federal district court to consider the issue, *id.* at *6 (citing district court cases), has held, consistent with the analysis in *Hodgson* and the other circuit courts of appeals decisions, that the 1994 Hyde Amendment bars participating states from denying funding to Medicaid-eligible women for abortions in cases of rape or incest. *See also Edwards v. Hope Medical Group for Women*, 115 S. Ct. at 2 (citing four circuit court decisions, including *Hodgson*, construing prior Hyde Amendment).

In addition, we note that this court in *Freeman* rejected the Nebraska defendants' argument based on *Beal v. Doe*, 432 U.S. 438 (1977), that the Congress which enacted the Medicaid statute could not have intended to require states to fund abortions because at that time (1965) abortions except to save the life of the mother were illegal in most states. 614 F.2d at 590-91 (refusing to read *Beal v. Doe* to permit a state to withhold funding for any service, no matter how medically necessary, that was not legally available in 1965).

Finally, we hold in No. 94-2885EA that the district court did not err in invalidating the entire Arkansas state

constitutional amendment and in declining to rewrite the amendment to cure the invalidity. Redrafting the amendment or writing in exceptions in order to cure the invalidity presented by the plain meaning of its language would have involved the district court in "positive legislative enactment clearly beyond its judicial role." *Valley Family Planning v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). Further, the district court did not err in holding that sections 2 and 3 of Amendment 69 have no function independent of the first section and no practical working purposes. These two sections are mutually connected with and dependent on section 1 and would be without operative effect if allowed to stand by themselves. *Handy Dan Improvement Center, Inc. v. Adams*, 276 Ark. 268, 633 S.W.2d 699 (1982); *Allen v. Langston*, 216 Ark. 77, 224 S.W.2d 377 (1949).

In sum, we hold the Arkansas state constitutional amendment and the Nebraska state regulation prohibiting the use of public funds for abortions except to save the life of the mother violate the federal Medicaid statute, as amended by the 1994 Hyde Amendment, and are therefore invalid under the supremacy clause.

Accordingly, the judgments of the district courts are affirmed.

BOWMAN, J., concurring in part and dissenting in part.

The Supreme Court has held that Title XIX does not require states participating in the Medicaid program to fund abortions that are not certified by physicians as medically necessary. *Beal v. Doe*, 432 U.S. 438, 447 (1977). The Court also has held that Title XIX does not require participating states to pay for those abortions certified as

medically necessary for which Congress, through the Hyde Amendment, has denied federal reimbursement. *Harris v. McRae*, 448 U.S. 297, 311 (1980). It appears, however, that the Supreme Court has not expressly addressed the precise issue presented in the cases now before us, *i.e.*, whether a participating state may, consistent with Title XIX, withhold funding for abortions certified as medically necessary for which federal reimbursement is available under the Hyde Amendment. *See Williams v. Zbaraz*, 448 U.S. 358, 363 & n.5 (1980).

In *Beal*, the Supreme Court recognized that Title XIX gives each participating state "broad discretion." 432 U.S. at 444, to determine which medical procedures, among the vast array of those that physicians may certify as medically necessary, the state will fund. Here, the Arkansas and Nebraska defendants argue that this "broad discretion" extends to denying state funding for all abortions except those performed to save the life of the mother. Were we writing on a clean slate, I would be inclined to agree with the defendants that states participating in the Medicaid program are not required to fund abortions merely because Congress, by loosening the strictures of the Hyde Amendment against the expenditure of federal funds for abortions, has chosen to make federal reimbursement available. However, as Judge McMillian's opinion demonstrates, the existing federal decisions, including prior decisions of this Circuit by which the present panel is bound, are to the effect that a state's approach to the public funding of abortions through the Medicaid program cannot be more restrictive than the Hyde Amendment. *See, e.g., Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 611-15 (8th Cir. 1980).

Faithfulness to the law as it is, rather than as one might think it ought to be, requires us to reject defendants' position to the contrary. I therefore join the Court's opinion to the extent it holds that under the 1994 Hyde Amendment participating states may not refuse to provide funding for abortions certified as medically necessary for Medicaid-eligible women in cases in which the pregnancy is the result of rape or incest.

I do not agree, however, that it was proper for the District Court to enjoin Amendment 68 of the Arkansas Constitution in its entirety.[1] The full text of Amendment 68 is as follows:

> Amend. 68. Abortion.
>
> § 1. Public funding.
>
> No public funds will be used to pay for any abortion, except to save the mother's life.
>
> § 2. Public policy.
>
> The policy of Arkansas is to protect the life of every unborn child from conception until

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[1] There is loose talk in the briefs of the parties about the District Court's having declared Amendment 68 null and void. What the court actually did, however, was to enjoin the enforcement of Amendment 68 "in its entirety for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act." *Little Rock Family Planning Servs. v. Dalton*, No. LR-C-93-803, Mem. Op. and Order at 35 (E.D. Ark. July 25, 1994). In effect, the District Court has benched Amendment 68, but has not banished it from the game forever. Thus, should Congress again change the Hyde Amendment to its earlier formulation of no federal funds for abortions except to save the life of the mother, the injunction could be lifted, and Amendment 68 once again would be fully enforceable.

> birth, to the extent permitted by the Federal Constitution.
>
> § 3. Effect of amendment.
>
> This amendment will not affect contraceptives or require an appropriation of public funds.

Ark. Const. amend. 68. Neither section 2 nor section 3 would appear to be implicated by the District Court's Medicaid ruling that we here sustain, and section 1 is implicated only insofar as this ruling results in Arkansas's being required, in cases of rape or incest, to use public funds to pay for abortions that are not necessary for purposes of saving the mother's life. To that extent, Amendment 68 must yield to federal law, but the Supremacy Clause can be given its due by measures far less draconian and far less intrusive on the public policy of the state of Arkansas than the drastic remedy that has been imposed here. I believe the question is not, as the District Court thought, whether it had the authority to rewrite Amendment 68, but whether, in order for the federal interest to be fully served, it would be entirely sufficient simply to enjoin the defendants from relying on or enforcing section 1 in cases of medically necessary abortions for Medicaid-eligible women where pregnancy results from rape or incest. An order of this sort, tailored to fit the circumstances of the case, would uphold the supremacy of federal law in the somewhat narrow range of cases in which it trumps state law without running roughshod over the state interest, and would leave Amendment 68 available to be given effect in its many possible applications that are completely consistent with federal law.

As the plaintiffs themselves have emphasized (*see* Brief of Plaintiffs-Appellees at 39-40), what we have in this case is an "as applied" challenge to Amendment 68, not a facial challenge. "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of *certiorari*). Justice Scalia's observation is solidly grounded in the Supreme Court's consistent practice, and applies with at least equal force when a provision of a state constitution is found invalid under the federal Constitution. Except for a limited category of First Amendment free-speech cases involving overbroad statutes, "the rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Like the Supreme Court in *Brockett*, I believe that "[t]he case[] before us [is] governed by the normal rule that partial, rather than facial, invalidation is the required course." *Id.* at 504. The "normal rule" could easily be observed in this case by means of a limited injunction of the kind mentioned in the preceding paragraph. I therefore respectfully dissent from our Court's affirmance in No. 94-2885 of the District Court's order enjoining the enforcement of Amendment 68 in its entirety.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3903

G. William Orr, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; Womens Services, P.C.,

Appellees,

v.

E. Benjamin Nelson, in his official capacity as Governor of the State of Nebraska; Donald Stenberg, in his official capacity as Attorney General of the State of Nebraska; Mary Dean Harvey, in her official capacity as Director of the Nebraska Department of Social Services,

Appellants.

4:94-CV-3252

Appeal from the United States District Court for the District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

July 25, 1995

A true copy. /s/ Michael E. Gans

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

G. WILLIAM ORR, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; and WOMENS SERVICES, P.C.,	)	4:CV94-3252
Plaintiffs,	)	
vs.	)	**MEMORANDUM AND ORDER**
E. BENJAMIN NELSON, in his official capacity as Governor of the State of Nebraska; DONALD STENBERG, in his official capacity as Attorney General of the State of Nebraska; and MARY DEAN HARVEY, in her official capacity as Director of the Nebraska Department of Social Services,	)	(Filed Nov. 4, 1994)
Defendants.	)	

Because the State of Nebraska refuses to use its Medicaid funds to pay for abortions in cases of rape and incest, the plaintiffs have sued the defendants, seeking injunctive relief. The plaintiffs have filed a motion for summary judgment (Filing 7). There are no material facts in dispute, and the defendants concede standing and concede that the case may be decided on the merits. (Br. Opp'n Pls.' Mot. Summ. J. at 5.) I shall grant the motion for summary judgment and enjoin the defendants.

I.

The following facts are undisputed:

1. Plaintiff G. William Orr is a physician licensed to practice medicine in the State of Nebraska and board certified in Obstetrics and Gynecology. (Orr Dec. ¶ 1; admitted, Answer ¶ 4.)

2. Dr. Orr is the president of Womens Services, P.C., also a plaintiff in this action. (Orr Dec. ¶ 2.)

3. Womens Services, P.C., is enrolled as a Medicaid provider in Nebraska. (Orr Dec. ¶ 3.)

4. Dr. Orr performs first- and second-trimester abortions at Womens Services up to the 16th week of pregnancy. (Orr Dec. ¶ 2.)

5. Among the patients Dr. Orr sees are women seeking abortions who are eligible for medical assistance in Nebraska and are pregnant as a result of rape or incest. (Orr Dec. ¶ 2.)

6. On July 27, 1994, Dr. Orr submitted a claim to Nebraska Medicaid for an abortion performed by him for a woman who was pregnant as a result of rape. His office was informed by a representative of the Department of Social Services (the Department) that Medicaid would not reimburse the claim. (Orr Dec. ¶ 4.)

7. Defendant E. Benjamin Nelson is the governor of the State of Nebraska and is responsible for reviewing and approving all rules and regulations promulgated by agencies of the state government of Nebraska, including the Department of Social Services. Neb. Rev. Stat. § 84-905.01 (1987). (Admitted, Answer ¶ 6.)

8. Defendant Donald Stenberg is the attorney general of the State of Nebraska and is responsible for reviewing and approving all rules and regulations promulgated by agencies of the state government of Nebraska, including the Department of Social Services. Neb. Rev. Stat. § 84-905.01 (1987). (Admitted, Answer ¶ 7.)

9. Defendant Mary Dean Harvey is director of the Nebraska Department of Social Services, which is charged with the administration of all forms of public assistance in the state, including the Nebraska medical assistance program. Neb. Rev. Stat. § 68-703 (1990). (Admitted, Answer ¶ 8.)

10. The "Hyde Amendment" is the name given to language that, since fiscal year 1977, has been inserted annually into federal appropriations bills, and which limits the circumstances in which federal funds may be used for Medicaid abortions. (Admitted, Answer ¶ 36 (admitting ¶ 37 [*sic*] of Compl.).)

11. The specific circumstances under which the Hyde Amendment permits federal funds to cover abortion services have varied over the years. Federal funding for abortions necessary to save the mother's life has always been permitted; funding for abortions necessary to prevent severe, long-term physical damage and for women pregnant as a result of rape or incest has been permitted in some years. (Compl. ¶ 40.)

12. Between fiscal year 1981 and fiscal year 1993, the Hyde Amendment limited federal funding of abortion to those instances when the life of the mother would be threatened by carrying the fetus to term. *See, e.g.*, Dep't of

Labor, Health & Human Servs., Educ. & Related Agencies Appropriations Act of 1992, Pub. L. No. 102-394, § 203, 106 Stat. 1792, 1811 (1992). (Compl. ¶ 41.)

13. In the fiscal years between 1981 and 1983, Congress gave participating states the option not to cover medically necessary abortions for which they could receive federal reimbursement – i.e., those abortions covered in the Hyde Amendment – through an amendment to the Hyde Amendment known as the Bauman Amendment. For example, the Bauman Amendment to the Hyde Amendment for fiscal year 1981 added the following proviso: "Provided, however, that the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." Supplemental & Continuing Appropriations & Recision Act of 1981, Pub. L. No. 97-12, § 109, 95 Stat. 95 (1981). Such language has been absent from the Hyde Amendment since 1984. (Compl. ¶ 42.)

14. On October 21, 1993, President Clinton signed into law the Department of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112 (1993), which permits federal funds to be used for abortions where the mother was the survivor of rape or incest. Section 509 of the 1994 appropriations bill (the "1994 Hyde Amendment") provides that:

> [n]one of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or office to which funds are appropriated under this Act that such procedure is necessary to save the life

> of the mother or that the pregnancy is the result of an act of rape or incest.

(Admitted, Answer ¶ 43.)

15. The Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) informed state Medicaid directors of this requirement in a letter dated December 28, 1993 (the HHS directive) (Ex. F attached to Compl.). The HHS directive advises state Medicaid directors that, effective October 1, 1993, Medicaid plans must cover abortions to terminate pregnancies resulting from rape or incest in conformity with this year's Hyde Amendment. The HHS directive states:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be

> considered to fall within the scope of services that are medically necessary.

(Compl. ¶ 44.)

16. In a letter dated January 5, 1994, HCFA Administrator Bruce Vladeck further advised the chair of the State Medicaid Directors Association that:

> When Congress enacted the Hyde Amendment last year, it added abortions in the case of pregnancies resulting from the tragedy of rape or incest to the category of abortions which Medicaid must cover. Thus, if state law conflicts with this enactment, court decisions require that state law give way to the federal law insofar as it applies to the Medicaid program.

(Ex. G attached to Compl.) (Admitted, Answer ¶ 45.)

17. On March 25, 1994, the director of the HHS Medicaid Bureau sent a supplemental letter to state Medicaid directors to inform them that:

> individuals participating in your Medicaid programs may claim entitlement to the Federal benefits that are currently provided under that program, including payment for an abortion that results from an act of rape or incest, Federal courts that have considered the issue in the past have held that State law impediments cannot stand in the way of an individual's entitlement under a State Medicaid program to medically necessary services, including abortions, for which Federal funds are available.

(Ex. H attached to Compl.) (Admitted, Answer ¶ 46.)

18. On August 31, 1994, defendant Stenberg issued a legal opinion to Governor Nelson and Mary Dean

Harvey, director of the Department of Social Services, recommending that "the Department of Social Services and the Governor of Nebraska not amend state rules to expand the use of taxpayer funds to pay for abortions." (Batt Dec. Ex. A at 22.)

19. On September 2, 1994, Governor Nelson issued a news release stating that "[t]he state will fight a federal mandate that requires government funding of abortions in cases of rape and incest." (Batt Dec. Ex. B.)

II.

Virtually all courts that have considered the issue have concluded that the 1994 Hyde Amendment preempts conflicting state law so that a state may not prohibit funding for abortions in cases of rape or incest while the state continues to accept federal Medicaid funds. The appellate courts have not disturbed those rulings. *Hope Medical Group for Women v. Edwards*, No. 94-1129, 1994 WL 454805 (E.D. La. July 28, 1994) (permanently enjoining, as inconsistent with Hyde Amendment, Louisiana's statutory funding restriction insofar as it prohibits state funding for abortions in cases of rape or incest while the state continues to accept federal Medicaid funds), *stay pending appeal denied*, No. 94-30445 (5th Cir. Aug. 16, 1994), *stay pending appeal denied*, 115 S. Ct. 1, 63 U.S.L.W. 3125 (No. A-124) (Scalia, Circuit Justice Aug. 17, 1994); *Little Rock Family Planning Servs. v. Dalton*, No. LR-C-93-803, 1994 WL 386796 (E.D. Ark. July 25, 1994) (permanently enjoining, as inconsistent with Hyde Amendment, Arkansas state constitutional amendment restricting abortion funding); *Planned Parenthood v. Engler*, Nos. 4:94-CV-49 & 4:94-

CV-59, 1994 WL 443703 (W.D. Mich. July 18, 1994) (permanently enjoining, as inconsistent with Hyde Amendment, Michigan statute restricting abortion funding); *Jeanette R. v. Ellery*, No. BDV-94-811, not reported, but in app. in *Dalton* (Mont. Dist. Ct. June 1, 1994) (preliminarily enjoining, as inconsistent with Hyde Amendment, Montana administrative regulation restricting abortion funding); *Hern v. Beye*, No. 93-N-2350, 1994 WL 192366 (D. Colo. May 12, 1994) (permanently enjoining, as inconsistent with Hyde Amendment, Colorado state constitutional amendment restricting abortion funding); *stay pending appeal denied*, No. 94-1205 (10th Cir. May 31, 1994). *See also Roe v. Casey*, 623 F.2d 829 (3rd Cir. 1980); *Hodgson v. Bd. of County Comm'rs*, 614 F.2d 601 (8th Cir. 1980); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied*, 441 U.S. 952 (1979) (all four of these circuit cases found that the Hyde Amendment, as then constituted, was intended by Congress to modify Title XIX).

For essentially the reasons expressed in the above-cited cases, my conclusion is the same.[1] There is no good reason to restate what those other courts have laboriously and carefully explained. The point is simple: having taken federal funds, Nebraska must follow federal law.

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[1] In so holding, I do not agree with the defendants that this case is properly examined under the "Spending Clause." However, even if this case were properly examined on "Spending Clause" grounds, federal law is sufficiently clear as to what is required of the states that it easily survives such a challenge.

Accordingly,

IT IS ORDERED that:

(1) The plaintiffs' motion for summary judgment (Filing 7) is granted;

(2) Neb. DPW Program Manual § 18-004.08 (1982) shall be declared invalid under the Supremacy Clause of the United States Constitution;

(3) The defendants shall be permanently enjoined from enforcing Neb. DPW Program Manual § 18-004.08 (1982);

(4) A separate judgment shall issue.

DATED this 4th day of November, 1994.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

G. WILLIAM ORR, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; and WOMENS SERVICES, P.C.,	)	4:CV94-3252
Plaintiffs,	)	
vs.	)	**JUDGMENT**
E. BENJAMIN NELSON, in his official capacity as Governor of the State of Nebraska; DONALD STENBERG, in his official capacity as Attorney General of the State of Nebraska; and MARY DEAN HARVEY, in her official capacity as Director of the Nebraska Department of Social Services,	)	(Filed Nov. 4, 1994)
Defendants.	)	

IT IS ORDERED that final judgment in this case is hereby entered in favor of the plaintiffs and against the defendants, providing that:

(1) Neb. DPW Program Manual § 18-004.08 (1982) is declared invalid under the Supremacy Clause of the United States Constitution;

(2) The defendants are permanently enjoined from enforcing Neb. DPW Program Manual § 18-004.08 (1982);

(3) The defendants shall pay the costs of this action which are to be taxed by the Clerk of the United States District Court for the District of Nebraska.

DATED this 4th day of November, 1994.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3903NEL

G. William Orr, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; Womens Services, P.C., Appellees,	* * *

EXHIBIT H

(LOGO) DEPARTMENT OF HEALTH & HUMAN SERVICES Health Care Financing Administration

6325 Security Boulevard
Baltimore, MD 21207

MAR 25 1994

Dear State Medicaid Director:

On December 28, 1993 I wrote to notify you about the Congressionally enacted revision to the "Hyde Amendment" which governs Federal Funding of abortions. My letter described the requirements of the new law and explained how its provisions were to be implemented by States. Since that time, we have received a number of questions regarding implementation of the law. The purpose of this letter is to provide guidance to all States in the areas identified by those questions.

We have been asked if the change in the language of the most recent "Hyde Amendment" signifies a change in what is meant by "to save the life of the mother." We do not believe that Congress intended any change in this category of abortion coverage. Therefore, States should continue to apply the same criteria in identifying these cases as were previously used. As before, a physician certification indicating that, on the basis of the physician's professional judgment, the life of the mother would be endangered if the fetus were carried to term, must be submitted to the State Medicaid agency. The certification must contain the name and address of the patient and

must be signed by the physician. It is important to note that there are no exceptions to this certification requirement. A diagnosis code on the claim form may *not* be used in lieu of the above-described certification to document abortions performed to save the life of the mother.

With regard to the new provisions on abortions performed following rape or incest, HCFA will not require that any specific form(s) be used to document such cases. The State is free to use any form or forms it chooses. Furthermore, HCFA will not require that any documentation be submitted to us for review prior to making payment for abortions resulting from rape or incest *or* those performed to save the life of the mother. However, we do expect that documentation of the circumstances of these cases will be maintained in the medical records or in the records of the agencies to which cases of rape or incest must be reported (if any).

Similarly, HCFA will not establish a timeframe within which cases of rape or incest must be reported to a law enforcement or other agency. State law or policy should dictate when and to whom a rape or a case of incest must be reported. However, as noted in my December 28 letter, the State-established reporting requirements may not serve as an additional coverage requirement to deny or impede payment for abortions where pregnancies result from rape or incent [sic].

The State must establish procedures which permit the reporting requirements to be waived, and the procedure reimbursed, if the treating physician certifies that, in his or her professional opinion, the patient was unable, for

physical or psychological reasons, to comply with the reporting requirements.

We have also been asked whether States must claim FFP for the abortion services specified by the "Hyde Amendment." No State is compelled to claim FFP for abortion services. However, a State *must provide* abortion services to Medicaid recipients in accordance with the law even if the State chooses to claim no Federal monies for those services.

A number of questions were raised concerning the circumstances under which States must amend their Title XIX State plans to conform to the law. States with plans that currently make no mention of abortion coverage need not amend their plans in any way. States with plans which do not provide for coverage of abortion services in accordance with the "Hyde Amendment" must modify those plans to bring them into conformance with the law by March 31, 1994.

We recognize the difficulties that some States face because of State laws that may conflict with the current Medicaid requirements. We are willing to work with those States that demonstrate their willingness to take the necessary steps to bring their programs into compliance with Federal requirements in order to avoid any unnecessary disruption of ongoing programs.

However, States that have non-conforming plans after March 31, 1994, and States that indicate they will rely on conflicting State law as a basis for their continuing non-compliance, will be subject to the compliance process applicable to all Title XIX mandates.

You should be aware that individuals participating in your Medicaid programs may claim entitlement to the Federal benefits that are currently provided under that program, including payment for an abortion that results from an act of rape or incest, Federal courts that have considered this issue in the past have held that State law impediments cannot stand in the way of an individual's entitlement under a State's Medicaid program to medically necessary services, including abortions, for which Federal funds are available. These holdings would apply regardless of the status of any proceedings between the Department and a State with respect to its conformity with current Federal requirements.

I hope that this information is helpful to you in complying with the requirements of the law. Please call my office if you have any questions about this matter.

Sincerely yours,

/s/ Sally K. Richardson
Sally K. Richardson
Director
Medicaid Bureau

cc:
All Regional Administrators

EXHIBIT F

(LOGO) DEPARTMENT OF HEALTH & HUMAN SERVICES Health Care Financing Administration

8325 Security Boulevard
Baltimore, MD 21207

December 28, 1994

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> *None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.*

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the claim and

not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions for which FFP is being claimed. The form should outline the number of abortions performed to save the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother", has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically

necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies result from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

States which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies resulting from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,

/s/ Sally K. Richardson
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators

42 U.S.C. § 1396a(a)(17)(A) provides in relevant part:

A State plan for medical assistance must. . . .

(17) [i]nclude reasonable standards . . . for determining . . . the extent of medical assistance which

(A) are consistent with the objectives of this subchapter. . . .

42 C.F.R. § 441.202 provides:

FFP [Federal Financial Participation] is not available in expenditures for an abortion unless the conditions specified in §§ 441.203 and 441.206 are met.

42 C.F.R. § 441.203 provides, in relevant part:

FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term.

42 C.F.R. § 440.230(c) provides in pertinent part:

The Medicaid agency may not arbitrarily deny or reduce the amount, duration or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.

No. 95-766

Supreme Court, U.S.
F I L E D
DEC 7 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

E. BENJAMIN NELSON, in his official capacity as Governor of the State of Nebraska; DONALD STENBERG, in his official capacity as Attorney General of the State of Nebraska; and MARY DEAN HARVEY, in her official capacity as Director of the Nebraska Department of Social Services,

Petitioners,

—v.—

G. WILLIAM ORR, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; and WOMENS SERVICES, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

Whether, as this Court has held, the federal Medicaid Act may be enforced under 42 U.S.C. § 1983?

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Respondents G. William Orr, M.D., *et al.*, submit this brief in opposition to the petition for a writ of certiorari filed by petitioners the Governor of Nebraska, the Attorney General of Nebraska, and the Director of the Nebraska Department of Social Services. Petitioners seek review of a decision of the United States Court of Appeals for the Eighth Circuit, issued July 25, 1995, affirming the judgment of the United States District Court for the District of Nebraska entered on November 4, 1994. The opinion of the Court of Appeals is reported at 60 F.3d 497 (8th Cir. 1995).

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994), provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[1] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on August 12, 1994, seeking

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[1] *See* note 7, *infra*.

declaratory and injunctive relief barring enforcement of Neb. DPW Program Manual § 18-004.08 (1982) ("the challenged provision"), for so long as Nebraska receives federal Medicaid funding. The challenged provision would deny Nebraska Medicaid recipients coverage for abortions except when "the life of the mother would be endangered if the fetus were carried to term." Neb. DPW Program Manual § 18-004.08 (1982) (reproduced at Pet. 2).[2] Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provision must be enjoined because it directly conflicts with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

The district court granted respondents' motion for summary judgment, ruling that "having taken federal funds, Nebraska must follow federal law," App. 30, and that the challenged provision is "invalid under the Supremacy Clause of the United States Constitution." App. 31.

On December 1, 1994, petitioners filed a Notice of Appeal of the final judgment of the district court entered on November 4, 1994. The appeal was consolidated with a nearly identical case challenging an Arkansas restriction on Medicaid funding of abortions. On July 25, 1995, the United States Court of Appeals for the Eighth Circuit unanimously affirmed the decision of the district court. *See* App. 21-22.[3] The State's petition for rehearing and

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[2]Citations to the text of the petition for certiorari are in the form "Pet. --"; citations to the appendix to the petition are in the form "App. __."

[3]Judge Bowman dissented only from the severability holding in the Arkansas case, but did not dissent from the holding that participating

(continued...)

suggestion for rehearing *en banc* were denied on September 22, 1995. *See* App. 34.

REASONS FOR DENYING THE WRIT

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. Petitioners do not claim that the decision of the court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Nor could they. Indeed, the decision of the court below is in complete harmony with the decisions of the United States courts of appeals for the First, Third, Fifth, Seventh and Tenth Circuits, as well as six recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioners argue that the petition should be granted because the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and because the decision of the court of appeals conflicts with this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992). Petitioners are wrong on both counts.

First, petitioners misstate the decision of the court

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[3](...continued)
states must, under Title XIX, provide Medicaid coverage for those medically necessary abortions for which federal funding is available, or from the holding that Title XIX may be enforced through 42 U.S.C. § 1983.

below as supporting "the proposition that whenever Congress makes federal Medicaid funding for a particular service or procedure available, States are therefore compelled to pay for that service or procedure as well." Pet. 5. The court of appeals actually held that Title XIX, the federal Medicaid statute, imposes obligations on the states to provide Medicaid coverage for medically necessary abortions. *See* App. 15. Title XIX itself makes clear that particpating states must provide coverage for certain categories of procedures and services that are mandatory, and abortion falls squarely within several of those categories.

Second, petitioners purport to find a conflict between the lower court's ruling that Title XIX is enforceable under 42 U.S.C. § 1983, and this Court's decision in *Suter v. Artist M.* But *Suter* has nothing to do with state obligations under the federal Medicaid program or with abortion. Rather, petitioners invoke *Suter* for the generic proposition that Congressional conditions on a state's receipt of federal funds must be unambiguous. What petitioners fail to note, however, is that for over fifteen years federal law has, in fact, been unambiguous that state Medicaid programs must cover all medically necessary abortion services for which federal funding is not proscribed; and that Title XIX unambiguously requires states to fund medically necessary abortions, a requirement of which states may be relieved by the Hyde Amendment, but a requirement which is nonetheless unambiguous.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing this precise issue, and this Court has already denied a writ of certiorari in three of those cases, there is no compelling reason for this Court to use its limited resources to review

this matter. The petition should therefore be denied.[4]

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED.

The lower court's decision invalidating Nebraska's restriction on Medicaid funding of abortions is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445, 1995 LEXIS U.S. App. 33214 (5th Cir. Oct. 17, 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-820);[5] *Hern v. Beye*, 57 F.3d

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[4]Point heading I(F) of the petition seeks to "incorporate and adopt the arguments made by the Petitioner in Docket Number 95-701." To the extent this incorporation by reference seeks to evade the page limitation for petitions established by Supreme Court Rule 33, constitutes the filing of a separate brief as prohibited by Supreme Court Rule 14.2, or constitutes "failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration," Sup. Ct. R. 14.4, this incorporation by reference provides an additional ground for denying the petition. In any event, this Court denied certiorari in No. 95-701. *Weil v. Hern, cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995).

[5]In their petition for certiorari, the petitioners in *Blackwell* do not contest "that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment." Petition for Certiorari at 10, *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995) (No. 95-820); *id.* at 10 n.6 (noting that petitioners do not raise this issue).

906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal pending*, Nos. 94-1913 & 94-2097 (6th Cir. argued Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) (order granting preliminary injunction); *Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A. v. Dalton*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (state court preliminary injunction prohibiting Montana from denying Medicaid coverage for abortions for rape and incest victims).

In three of these cases -- *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v.*

Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. Indeed, in denying an application for a stay pending appeal in *Edwards v. Hope Medical Group for Women*, 115 S. Ct. 1 (Scalia, Circuit Justice 1994), Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Id. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition, as it did the petition in *Hern v. Beye*.[6]

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[6]Petitioners argue that while "there is technically no split in the circuits with respect to the issue presented, it is clear there is a lack of unanimity and understanding regarding this question," Pet. 17, pointing to the vote counts by which the courts of appeals for the Eighth and Third Circuits denied rehearing *en banc* in this case and in *Blackwell*. This argument is flawed in two respects. First, the vote count does not indicate that the Circuit Judges voting for rehearing *en banc* disagreed with the panel decision. Second, lack of "unanimity" among *judges* of the courts of appeals is different from a lack of unanimity among *courts of appeals*.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION.

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court.

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical

assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce

abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the Department of Health and Human Services. The circumstances in which federal funds have been appropriated for low-income women's abortions has varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federally funded abortions to situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[7]

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[7]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not

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In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenges, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal

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[7](...continued)
to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before the Hyde Amendment was enacted.[8]

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision.

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* App. 39. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are

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[8]Petitioners' request that this Court grant the petition to decide the question left open in *McRae* regarding whether the Hyde Amendment substantively amends Title XIX must be rejected. As shown herein, the lower court's decision is legally correct regardless of whether the Hyde Amendment substantively amends Title XIX.

> medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

App. 40-41.[9] HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

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[9]Contrary to petitioners' argument, respondents do not claim that every Medicaid-eligible woman or girl who is pregnant as a result of rape or incest has, as a matter of law, a medical need for an abortion. Rather, they claim that if a low-income woman's physician determines "in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient," *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that an abortion to terminate a pregnancy resulting from rape or incest is in the interests of a patient's health and thus medically necessary, federal law requires that the procedure be covered by Medicaid.

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined.

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provision prohibits -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE COURT OF APPEALS CORRECTLY HELD THAT TITLE XIX IS ENFORCEABLE UNDER 42 U.S.C. § 1983.

Petitioners' attempt to construe *Suter v. Artist M.*, 503 U.S. 347 (1992), as foreclosing enforceability of Title XIX through 42 U.S.C. § 1983, was properly rejected by the court below. *See* App. 11-12.

In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), this Court wrote:

> [T]he fact that a federal statute has preempted certain state action [under the Supremacy Clause] does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.

Id. at 108. *Golden State* adopted the following test for determining whether a federal statute that preempts state action under the Supremacy Clause gives rise to a cause of action under § 1983:

> In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within the "the competence of the judiciary to enforce," is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself."

Id. Applying *Golden State*, this Court has subsequently held specifically that rights under the Medicaid statute are enforceable under § 1983. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). The decision of the court below is in complete harmony with *Golden State* and *Wilder*, and petitioners have provided no grounds for reviewing it.

Faced with this clear law, petitioners argue that the decision of the court below is in conflict with *Suter v. Artist M.*, 503 U.S. 347 (1992), where this Court held that the Adoption Assistance and Child Welfare Act of 1980 does not "confer[] an enforceable private right on its beneficiaries," *id.* at 364, because no such privately enforceable right was "unambiguously" conferred by Congress.[10] This argument fails because the obligation of

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[10]While *Suter* may, as petitioners contend, have modified the *Golden State* test for enforceability under § 1983, clarification of that modification should await a case in which the result under *Suter*'s analysis would be different than under *Golden State*'s. This is not such a case, because, as set forth below, Title XIX and the Hyde Amendment clearly create rights enforceable under § 1983.

participating states to provide Medicaid coverage for those medically necessary abortions for which federal funding is available is unambiguous.[11]

Title XIX and the Hyde Amendment impose an unambiguous mandatory obligation. This obligation has been clear in Nebraska since 1980. As the district court held in awarding attorney's fees to respondents:

> [S]ince the courts have consistently held for more than 14 years that the states are obligated to fund medically necessary abortions under Medicaid unless the Hyde Amendment provides otherwise; and since Congress has obviously been aware of this interpretation and has chosen not to continue to give the states discretion regarding funding for abortions otherwise authorized by the 1994 Hyde Amendment; and since the 1994 Hyde Amendment (whatever else it may mean) specifically contemplates the use of Medicaid funds for abortions necessitated by rape or incest, I find and conclude that the 1994 Hyde Amendment imposed an *unambiguous* mandatory obligation on the states to fund abortions under Medicaid in the case of rape or incest.

Orr v. Nelson, 874 F. Supp. 998, 1003-04 (D. Neb. 1995)

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[11]Moreover, unlike the claims of the petitioner in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), petitioners here cannot reasonably claim that they were unaware that the Hyde Amendment provides a floor for Medicaid coverage of abortion. By 1982, when the challenged provision was promulgated, several federal appellate courts, including the court of appeals for the Circuit in which Nebraska is located, had already decided that state Medicaid programs must fund abortions for which federal funding is not proscribed. *See Roe v. Casey; Reproductive Health Services; Hodgson; Zbaraz; Preterm.*

(emphasis in original), *aff'd*, No. 95-1555 (8th Cir. Oct. 4, 1995). Thus, the court of appeals correctly held that § 1983 is available to respondents to enforce their federal rights under Title XIX and the Hyde Amendment.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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